UNITED STATES COURT OF APPEALS
SECOND CIRCUIT
United States Courthouse
Foley Square
New York 10007

Elaine B. Goldsmith
Clerk

June 1, 1993

TO: James M. Furey, Esq.
Furey, Furey, Lapping, Demaria
& Schwarz, P.C.
600 Front St., P.O. Box 750
Hempstead, New York 11550-4494

RE: **In Re: Deccaid Services**
DOCKET NO.: **93-3058**

Your **Petition for Writ of Mandamus** has been received and filed. It has been added to the substantive motion calendar for **Tuesday, June 8, 1993 ***ON SUBMISSION*****.

There will be no oral argument on this motion.

Opposing papers, will not be accepted unless an order of the court directs that an answer be filed. (Federal Rules of Appellate Procedure 21 [b]).

Very truly yours,

ELAINE B. GOLDSMITH, Clerk
by: Chandella Gaillard

s/Chandella Gaillard
Deputy Clerk

cc: Hon. Leonard D. Wexler, D.J.
Laurence Shiff, Esq.

EDNY
91-CV-3805
WEXLER

JMW UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the 9th day of June, one thousand nine hundred and ninety-three.

PRESENT: Honorable James L. Oakes,
Honorable John M. Walker, Jr.
Honorable Harlington Wood, Jr.

Circuit Judges.

In Re: DECCAID SERVICES, INC., STEVEN STECKLER, PETER KIM, LUIGI TREGLIA MEDICAL FUNDING OF AMERICA, INC. DAVID SMITH and MORTON MACKOF,

Petitioners.

FONAR CORPORATION,

Plaintiff,

- v. -

ORDER
No. 93-3058

DECCAID SERVICES, INC., STEVEN STECKLER, PETER KIM, LUIGI TREGLIA MEDICAL FUNDING OF AMERICA, INC. DAVID SMITH and MORTON MACKOF,

Defendants.

United States Court of Appeals -- Second Circuit
Filed June 9, 1993
Elaine B. Goldsmith, Clerk

Petition for writ of mandamus and motion for stay of trial from the United States District Court for the Eastern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Eastern District of New York (Wexler, J.), and was submitted.

UPON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the petition for writ of mandamus is GRANTED and the motion for stay of trial DENIED.

No. 93-3058.

The petition for writ of mandamus is granted. The court directs the changes to the Confidentiality and Protective Order set forth in Exhibit A to this order.

The motion for a stay of trial is denied. However, the court orders an adjournment upon the trial date of not less than 60 days from the current July 20, 1993 trial date.

SO ORDERED.

s/James L. Oakes
Hon. James L. Oakes, U.S.C.J.

s/J.M. Walker
Hon. John M. Walker, Jr., U.S.C.J.

s/Harlington Wood, Jr.
Hon. Harlington Wood, Jr., U.S.C.J.

INSERTS FOR CONFIDENTIALITY AND PROTECTIVE ORDER

INSERT A

, subject to the provisions of paragraph 5,

INSERT B

5. At least ten (10) days prior to the initial disclosure to an Independent Advisor of the Producing Party's Confidential Information, Counsel of Record for the Receiving Party shall notify in writing Counsel of Record for the Producing Party of the name, address and employment affiliations of the Independent Advisor. If Counsel of Record for the Producing Party objects to the disclosure of Confidential Information to an Independent Advisor selected by the Receiving Party, the Counsel of Record for the Producing Party shall notify the Counsel of Record for Receiving Party of such objection within five (5) days after the date it receives notice of the Receiving Party's choice of the Independent Advisor. The parties shall promptly confer in good faith in an attempt to resolve any dispute with respect to the Receiving Party's selection of an Independent Advisor. If the parties fail to resolve any such dispute within three (3) days after the date upon which Producing Party's objection is received, the Producing Party may, within seven (7) days after the date it notices its objection to the Receiving Party, move before the District Court for a protective order challenging the Receiving Party's proposed disclosure of Confidential Information to the Independent Advisor. If the Producing Party properly files a motion for a protective order, the Receiving Party shall file opposing papers within five (5) days and shall not disclose Confidential Information to the Independent Advisor, except that if the court has not ruled upon the motion

within fourteen (14) days after it is filed, the Receiving Party may disclose Confidential Information to the Independent Advisor.

6. All notices or objections pursuant to paragraph 5 shall be made in writing between counsel and shall be promptly faxed. The times for all notices and objections shall be strictly adhered to and failure of the Producing Party to object within the time period designated shall be deemed a waiver of any objection. Saturdays, Sundays and holidays shall not be exempt from the calculation of time for purposes of this Stipulation.

INSERT C

CONFIDENTIAL -- This document

INSERT D

including the exhaustion of all appeals,

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

FONAR CORPORATION,	)	
Plaintiff,	)	Civil Action No. CV-91-3805 (Wexler, J.)
-against-	)	
	)	ORDER
DECCAID SERVICES, INC., EQUI MED LEASING, INC., MEDICAL FUNDING OF AMERICA, INC., DAVID SMITH, MORTON MACKOF, STEPHEN STECKLER, LOUIS TREGLIA and PETER KIM,	)	
Defendants.	)	

CONFIDENTIALITY AND PROTECTIVE ORDER

WHEREAS, documents or information proprietary to parties or witnesses containing confidential financial, technical or commercial information and/or trade secrets not publicly disclosed or generally known (hereinafter individually and collectively referred to as "Company Secrets") may be produced or disclosed in the course of discovery proceedings in this action; and

WHEREAS, disclosure of Company Secrets would cause undue burden, expense, injury or oppression to a party or witness, and good cause exists for entry of a confidentiality and protective order pursuant to Rule 26, Fed. R. Civ. P.; and

WHEREAS, the Court wishes the parties to proceed expeditiously with discovery in this action without burdening the Court with unnecessary procedural litigation;

IT IS HEREBY STIPULATED AND AGREED that the following rules and procedures shall govern the disclosure of confidential and proprietary information in this action:

1. Any information disclosed by a party or a non-party witness (the "Producing Party") in this litigation that the Producing Party reasonably believes to constitute a trade secret or other confidential or proprietary information may be designated as "Confidential Information" by the Producing Party. ~~In addition, a Producing Party may (subject to the provisions of paragraph 2 below) designate certain information as "Specially Confidential Information". The "Specially Confidential", as used herein, may also be referred to as "Confidential – For Counsel Only", or "Confidential – Attorneys' Eyes Only". All references to "Specially Confidential" below shall be deemed to include these other equivalent references.~~

~~2. The category of "Specially Confidential Information" is intended to be limited to that confidential information which, if disclosed to another party herein or to the public at large, would compromise or threaten important business interests of the Producing Party.~~

3. Confidential or Specially Confidential Information disclosed to a party (the "Receiving Party") in the course of this litigation: (a) shall not be used by the Receiving Party for any purpose other than the prosecution or defense of this litigation; and (b) shall

not be disclosed by the Receiving Party except in compliance with the terms hereof. This provision shall survive termination of a Receiving Party's involvement in this litigation for a period of ten years.

4. Subject to the other terms of this Stipulation, Confidential Information may be made available by a Receiving Party only to the following persons for use in connection with their duties in the course of this litigation:

(a) attorneys of record herein and other members of, or attorneys regularly employed by, their firm(s) who are working on this litigation ("Counsel of Record");

(b) persons regularly employed by such attorneys or their firm(s), working under the supervision of Counsel of Record in connection with this litigation;

(c) persons who have been retained by the Receiving Party specifically to provide expert assistance or advice in this litigation (collectively referred to as "Independent Advisors"), and persons regularly employed by them, to the extent necessary when working under the supervision of such an Independent Advisor in connection with this litigation; INSERT A

(d) the officers, directors and employees of the Receiving Party with responsibilities relating to the litigation or assisting counsel in the conduct of the litigation;

(e) the Court and its employees;

(f) court reporters or stenographers, or other

persons preparing transcripts of testimony under the supervision of a court reporter or stenographer, who have been provided with a copy of this Stipulation and have agreed to abide by its terms; and

(g) any other person upon such terms and conditions as the parties may agree or as the Court may hereafter by order direct; provided that any person to whom Confidential ~~or Specially Confidential~~ Information is disclosed ~~pursuant to subparagraph (c) above~~ shall, prior to such disclosure, execute a declaration under penalty of perjury in the form annexed hereto as Exhibit A; ~~and~~ that ~~any person to whom Confidential Information is disclosed pursuant to subparagraph (d) above shall, prior to any such disclosure, execute a declaration under penalty of perjury in the form annexed hereto as Exhibit B.~~ Such declarations shall be retained by Counsel of Record making such disclosure, and shall be made available to Counsel of Record for the Producing Party upon a showing of good cause.

~~5. Specially Confidential Information may be disclosed only to the persons described in subparagraphs 4(a), (b), (e), (f) and (g) above, and to the persons described in subparagraph 4(c) above~~ subject to ~~the provisions of Paragraph 6 below and the other terms hereof.~~

INSERT B

~~6. At least fifteen (15) days prior to the disclosure of Specially Confidential Information to any Independent Advisor, Counsel of Record for the Receiving Party shall inform Counsel of Record for the~~

Producing Party in writing of the name, address and usual employment affiliation of the Independent Advisor, and shall furnish therewith (a) a copy of a current resume or curriculum vitae of the Independent Advisor, (b) a list of all employment, consulting relationship and/or engagements in which the Independent Advisor is currently involved, or has been involved for the preceding three years, (c) a description of the nature of the Specially Confidential Information to be disclosed (e.g., sales information or development information), sufficient in detail to allow the Producing Party to determine in good faith whether to object to disclosure of such information to the Independent Advisor, and (d) a copy of an executed declaration made by the Independent Advisor in the form annexed hereto as Exhibit A. Such disclosure shall not be a waiver of any otherwise applicable privilege or of any rights of the Producing Party pursuant to Rule 26(b), Fed. R. Civ. P.

7. If the producing Party objects to the disclosure of Specially Confidential Information to an Independent Advisor, it shall so notify the Receiving Party in writing within fourteen (14) days of the identification by the Receiving Party of the Independent Advisor. The parties shall then confer in good faith in an attempt to resolve the dispute. If the parties are unable to do so, and the Producing Party shall move within twenty-five (25) days of its objection for an appropriate protective order. During the period to confer on such an objection, disclosure shall not be made by the Receiving Party to any Independent Advisor to whom the Producing Party has objected pending resolution of the Producing Party's objection. If the Producing Party files a motion for an appropriate protective order within the time period allowed above, no such disclosure shall be made until resolution of the

~~motion. The Producing Party's burden of going forward with such a motion shall not alter any otherwise applicable burden of proof with respect to the substance of the motion.~~

~~8. A Producing Party's failure to object to disclosure to an Independent Advisor at the time of his or her identification shall not preclude the Producing Party from later asserting, in writing, a good faith objection to the further availability of Confidential or Specially Confidential Information to such person. A Producing Party's assertion of an objection pursuant to this paragraph shall not, in itself, require the Independent Advisor to return, or to cease working with, any Confidential or Specially Confidential Information previously provided to him or her, but the Receiving Party shall make no further disclosure of Confidential or Specially Confidential Information to the Independent Advisor following receipt of the objection until fifteen (15) days thereafter. The parties shall confer in good faith to attempt to resolve any objection asserted pursuant to this paragraph. If the parties are unable to do so, and the Producing Party continues to object, the Producing Party shall move within fourteen (14) days of its objection for an appropriate protective order. If a Producing Party files a motion for an appropriate protective order within the time period allowed above, no such further disclosure shall be made until the motion is resolved in a manner permitting the disclosure.~~

9. Any document disclosed in this litigation containing Confidential Information and all copies thereof ("Confidential Documents") shall be so designated by the Producing Party by marking each page thereof as "CONFIDENTIAL". ~~Any document~~

~~disclosed in this litigation containing Specially Confidential Information and all copies thereof ("Specially Confidential Documents") may be so designated by the Producing Party by marking each page thereof substantially as follows: "SPECIALLY CONFIDENTIAL," "CONFIDENTIAL -- FOR COUNSEL ONLY", or "CONFIDENTIAL -- ATTORNEY'S EYES ONLY".~~

10. If copies of documents are not provided to the Receiving Party prior to inspection, the Producing Party need not mark the documents prior to initial inspection. ~~For purposes of such an initial inspection and until copies are provided, all documents shall be considered "Specially Confidential".~~ However, any copies provided to the Receiving Party must be marked with the appropriate notice to be treated as Confidential ~~or Specially Confidential.~~

11. In the event that (pursuant to the other terms hereof) Confidential ~~or Specially Confidential~~ Information is disclosed or discussed in a deposition conducted herein, any deposition transcript or transcript excerpt containing or referring to such information and all copies thereof ~~("Confidential Excerpts" and "Specially Confidential Excerpts", respectively),~~ may be so identified by the Producing Party on the record of the deposition. If the Producing Party requests "Confidential" ~~or "Specially Confidential"~~ treatment on the record of the deposition, for a period of thirty-one (31) days following receipt of the transcript of the deposition, the Receiving Party shall treat the transcript in its entirety as so designated; in that event, the Producing Party shall, within thirty (30) days of its receipt of the transcript, serve the Receiving Party with a written confidentiality designation, indicating by page

and line number those portions of the transcript or transcript excerpts it deems Confidential ~~or Specially Confidential.~~ Subject to any later agreement or order, any portion of a deposition which is not designated by the Producing Party within thirty days as Confidential ~~or Specially Confidential~~ by timely written designation will be treated as non-confidential information.

12. All interrogatories and interrogatory answers (or portions thereof), and all requests for admission and responses thereto (or portions thereof), that contain Confidential ~~or Specially Confidential~~ Information (collectively referred to as "Confidential Discovery Pleadings" ~~or "Specially Confidential Discovery Pleadings", respectively)~~ may be so designated by the Producing Party at the time of service and by prominently typing on a cover page thereof the appropriate notice in the following form:

> ~~"Confidential [or Specially Confidential] — This document contains material designated as Confidential [or Specially Confidential] by agreement of the parties to this lawsuit. Access to that material is limited by the parties' agreement. Any unauthorized access or use may constitute a violation of that agreement."~~

~~In the event that the Court enters this Confidentiality Stipulation as an order, the notice shall read:~~

INSERT C

> ". contains material designated as Confidential ~~[or Specially Confidential]~~ under the terms of an Order entered by the Court in this action. Access to the information in this document is limited by that Order, and any unauthorized access or

use may constitute a violation of the Court's Order."

Each response to an interrogatory or request for admissions (or portion thereof) for which the Producing Party seeks Confidential ~~or Specially Confidential~~ treatment must be separately designated by typing, immediately before each such response, "CONFIDENTIAL:" ~~or "SPECIALLY CONFIDENTIAL:"~~ or the equivalent language referred to above.

~~13. In addition to and notwithstanding any other provisions of this Confidentiality Stipulation, the following shall not be retained or stored at the regular business premises of the actual Receiving Party: (a) all Confidential Documents (produced in discovery), Confidential Excerpts and Confidential Discovery Pleadings (collectively, "Confidential Material"); (b) all Specially Confidential Documents (produced in discovery), Specially Confidential Excerpts and Specially Confidential Discovery Pleadings (collectively, "Specially Confidential Material"); and (c) all portions containing Specially Confidential Information of all Confidential Filings and sealed pleadings (as described below).~~

14. All documents and pleadings of any nature containing Confidential ~~or Specially Confidential Information,~~ and all copies thereof, shall be maintained by any person qualified to receive and to retain them under the terms of this Stipulation in a secure manner, intended to minimize any risk of the inadvertent disclosure thereof.

15. Additionally, Counsel of Record for the Receiving Party shall maintain a complete record of all ~~Specially~~ Confidential Material furnished to any person who is not a member of the firm(s), or otherwise

regularly employed by Counsel of Record. Such record shall show the date upon which each item of ~~Specially~~ Confidential Material was furnished to any such person. Such records shall be made available to Counsel of Record for the Producing Party upon a showing of good cause.

16. Any person to whom Confidential ~~or Specially Confidential~~ Information is disclosed (subject to the other terms hereof) shall treat that information in a manner reasonably calculated to preserve the appropriate degree of confidentiality of such information.

~~17. Subject to the other terms hereof, Confidential or Specially Confidential Information may be disclosed by a Receiving Party in pretrial depositions, to the extent that its use is necessary, only at the deposition(s) of:~~

~~(a) present directors, officers or employees of the Producing Party;~~

~~(b) an author, addressee or other person indicated as a lawful recipient of a Confidential or Specially Confidential Document;~~

~~(c) a person clearly identified in the Confidential or Specially Confidential Information, or in prior discovery, or by the deponent in his or her deposition (without prior disclosure of the specific Confidential or Specially Confidential Information) as a source of the specific Confidential or Specially Confidential Information to be disclosed at the deposition (provided that prior to any disclosure under this subparagraph (d), notice must be given to the Producing Party of the specific information so that it has a fair opportunity to seek a protective order, which~~

~~notice may be given at the time of the deposition; and the parties agree to cooperate, and if necessary to defer any such disclosure to allow the Producing Party to seek such a protective order without delay);~~

~~(d) an Independent Advisor otherwise qualified under this Confidentiality Stipulation to receive such Information; or~~

~~(e) any person for whom prior authorization is obtained from the Producing Party or the Court.~~

17. At the request of a Producing Party, persons not entitled to receive Confidential ~~and/or Specially Confidential~~ Information shall be excluded from any portion of a deposition at which such information is or is likely to be, discussed or disclosed.

18. Any pleading or other document containing a Producing Party's Confidential ~~or Specially Confidential~~ Information shall only be filed with the Court under seal, except that to the extent that the Receiving Party can, without undue burden or expense, segregate the Producing Party's Confidential ~~or Specially Confidential~~ Information from non-confidential information within the material it intends to file, it shall do so, e.g., by segregating the Producing Party's Confidential ~~or Specially Confidential~~ Information in a separate "Confidential Annex" or "Schedule of Confidential Exhibits" (a "Confidential Filing").

INSERT D

19. Within sixty (60) days of the conclusion of this action, all written materials, other than work product, containing Confidential ~~and Specially Confidential~~ Information disclosed in that action and

that is in the possession, custody or control of the Receiving Party or its agents shall be destroyed or turned over to Counsel of Record for the Producing Party. All persons who have received any Confidential ~~or Specially Confidential~~ Information in the course of that action shall provide a declaration under penalty of perjury stating that all such written materials, other than work product, containing Confidential ~~or Specially Confidential~~ Information in their possession, custody or control have been destroyed or turned over to Counsel of Record for the Producing Party. The provisions of this Stipulation restricting the communication and use of Confidential ~~and Specially Confidential~~ Information continue to be binding after the conclusion of this litigation, except: (a) there is no restriction on information introduced into evidence on the public record or otherwise disclosed publicly in Court, and (b) a party may seek written permission from the Producing Party to disclose such information or an order of the Court to dissolve or modify this Stipulation.

20. If Counsel of Record for the Receiving Party at any time objects to the designation or continued treatment of certain information as Confidential ~~or Specially Confidential~~ by the Producing Party, it shall so notify Counsel of Record for the Producing Party, and the parties shall then confer in good faith to attempt to resolve the dispute. If Counsel of Record shall be unable to agree, following such consultation, as to whether the information is appropriately designated, it shall be the responsibility of the Receiving Party to move for an Order requiring redesignation of the information in dispute. Unless and until such an Order is obtained, the original designation by the Producing Party shall stand.

21. Nothing herein shall be deemed to restrict in any way a Producing Party's own use of Confidential ~~or Specially Confidential~~ Information disclosed by it in this litigation.

22. Inadvertent disclosure of any document or other information during discovery in this litigation, or inadvertent disclosure of Confidential ~~or Specially Confidential~~ Information without appropriate designation, shall be without prejudice to any claim that such document or other information is privileged, or Confidential ~~or Specially Confidential~~, and no party shall be held to have waived any rights by such inadvertent disclosure.

23. The designation of any material in accordance with this Stipulation as constituting or containing Confidential ~~or Specially Confidential~~ Information is intended solely to facilitate the preparation and trial of this litigation. A party's treatment of such material as confidential in compliance with this Stipulation is not an admission or agreement by the party that the material constitutes or contains confidential or proprietary information.

24. This Stipulation and the procedures set forth herein shall not affect the rights of the parties to object to discovery on any grounds, nor shall it relieve a party of the necessity of proper response or objection to discovery requests, nor shall it preclude any party from seeking further relief or protective orders from the Court as may be appropriate under the Federal Rules of Civil Procedure, Federal Rules of Evidence or any other statute, rule or authority.

~~25. Nothing herein shall be construed to preclude any party from asserting that some information is of~~

~~such a highly sensitive nature that its disclosure is overly burdensome and oppressive under the circumstances.~~

~~26. Notwithstanding any other provision herein, proprietary computer software programs and proprietary schematic diagrams for components of the systems at issue herein shall be made available only to persons eligible to receive Specially Confidential Information and, initially, only for inspection under circumstances of controlled access. Following such inspection, and upon a showing of good cause by the Receiving Party to require the physical production of copies of such material, the Receiving Party and Producing Party shall confer in good faith to determine whether sufficient restrictions on such production satisfactory to the Producing Party, including, by way of example only, restrictions on further reproduction and the retention of such material for a limited period of time, can be agreed upon to permit such production to occur.~~

~~27. Notwithstanding any other provision herein, if documents constituting or revealing source code information for computer software programs are to be disclosed by any party, such disclosure, if any, shall occur only under restrictions reflecting confidentiality in addition to those set forth herein to govern Specially Confidential Information, including, but not limited to, inspection under circumstances of controlled access.~~

28. Nothing herein shall be construed to affect in any way the evidentiary admissibility of any document, testimony, or other matter at trial. The parties agree to confer in good faith and well in advance concerning procedures for the mutual preservation of confidentiality, as far as possible, in the course of any court hearing, proceeding or trial to be

held herein. The designation of certain information as Confidential ~~or Specially Confidential~~ pursuant to this Stipulation shall not, for that reason alone, bar its introduction or use at trial pursuant to such terms and conditions as the Court may deem appropriate, consistent with the need for a complete and accurate record of the proceedings. At the same time, nothing herein shall preclude a party from asserting an objection to the introduction or use of Confidential ~~or Specially Confidential~~ Information at trial on the grounds of its confidentiality.

29. The parties shall cooperate in good faith to preserve, as far as possible, the confidentiality of all sealed pleadings or other non-public material on appeal, including the joint filing of any necessary motions in the district or appellate court(s). If the parties are unable, despite their efforts, to preserve the confidentiality of such pleadings or other non-public material on appeal, a party shall not be precluded for that reason alone from asserting that a particular item, not previously disclosed publicly, should constitute part of the record on appeal; the parties shall, however, confer in good faith to attempt to agree whether such an item is necessary for inclusion in the record on appeal, and in the event they are unable to so agree, the Producing Party may seek the intervention of the appropriate court.

30. Nothing herein shall be construed to preclude any party from utilizing in any manner any information that it presently lawfully possesses, or which lawfully comes into its possession outside the discovery process in this litigation.

31. Nothing herein shall preclude any party from applying to the Court for any modification of the terms

provided herein, as it may deem appropriate under the circumstances; provided, however, that prior to such application, the parties involved shall make every effort to resolve the matter by agreement.

Dated: May 11, 1993
Hauppauge, New York

SO ORDERED:

s/Leonard D. Wexler
United States District Judge

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

FONAR CORPORATION,

Plaintiff,

against : CV 91 3805
(Wexler, J.)

DEGGAID SERVICES, INC., EQUI MED LEASING, INC., MEDICAL FUNDING OF AMERICA, INC., DAVID SMITH, MORTON MACKOF, STEPHEN STECKLER, LOUIS TREGLIA and PETER KIM,

Defendants.

DECLARATION RESPECTING CONFIDENTIALITY

_____, under the pains and penalties of perjury, declares:

1. I reside at _____ in the City of _____ and State of _____.

2. I have read and I understand the provisions of the Confidentiality Stipulation in this litigation. I hereby promise and agree to be bound by its terms, and promise and agree to maintain, pursuant thereto, the confidentiality of all information furnished to me which has been designated as Confidential Information under that Stipulation. I understand that these promises are conditions precedent to my receipt of any

such information.

3. I hereby submit to the jurisdiction of the United States District Court for the Eastern District of New York for the purpose of enforcing the terms of this Declaration.

Executed under penalty of perjury under the laws of the United States on _____, 199_.

_____

(Declarant's Signature)

MANDATE

JMW UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT
EDNY
CV 91 3805
WEXLER

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the 9th day of June, one thousand nine hundred and ninety-three.

PRESENT: Honorable James L. Oakes,
Honorable John M. Walker, Jr.
Honorable Harlington Wood, Jr.

Circuit Judges.

In Re: DECCAID SERVICES, INC., STEVEN STECKLER, PETER KIM, LUIGI TREGLIA MEDICAL FUNDING OF AMERICA, INC. DAVID SMITH and MORTON MACKOF,

Petitioners.

FONAR CORPORATION,

Plaintiff,

- v. -

ORDER
No. 93-3058

DECCAID SERVICES, INC., STEVEN STECKLER, PETER KIM, LUIGI TREGLIA MEDICAL FUNDING OF AMERICA, INC. DAVID SMITH and MORTON MACKOF,

Defendants.

United States Court of Appeals -- Second Circuit
Filed June 9, 1993
Elaine B. Goldsmith, Clerk

Petition for writ of mandamus and motion for stay of trial from the United States District Court for the Eastern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Eastern District of New York (Wexler, J.), and was submitted.

UPON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the petition for writ of mandamus is GRANTED and the motion for stay of trial DENIED.

ISSUED AS MANDATE 6/14/93
No. 93-3058.

The petition for writ of mandamus is granted. The court directs the changes to the Confidentiality and Protective Order set forth in Exhibit A to this order.

The motion for a stay of trial is denied. However, the court orders an adjournment upon the trial date of not less than 60 days from the current July 20, 1993 trial date.

SO ORDERED.

s/James L. Oakes
Hon. James L. Oakes, U.S.C.J.

s/J.M. Walker
Hon. John M. Walker, Jr., U.S.C.J.

s/Harlington Wood, Jr.
Hon. Harlington Wood, Jr., U.S.C.J.

UNITED STATES COURT OF APPEALS
For the Second Circuit
No. 93-3058
June 18, 1993
Honorable J. Walker

In Re: Deccaid Services, Inc., Stephen Steckler, Peter Kim, Luigi Treglia, Medical Funding of America, Inc., David Smith and Morton Mackof,

Petitioners.

NOTICE OF MOTION FOR LEAVE TO MOVE AND MOTION FOR RECONSIDERATION OF WRIT OF MANDAMUS

Motion by:

Shiff & Tisman
280 Madison Avenue
New York, New York 10016
(212) 751-7500
Laurence Shiff, Esq.

Has consent of opposing counsel:
A. been sought? ☒ Yes ☐ No
B. been obtained? ☐ Yes ☒ No
Has service been effected? ☒ Yes ☐ No
Is oral argument desired? ☒ Yes ☐ No
(Substantive motions only)
Requested return date:
(See Second Circuit Rule 27(b))
Has argument date of appeal been set: Not applicable.
A. by scheduling order? ☐ Yes ☐ No
B. by firm date of argument notice? ☐ Yes ☐ No
C. If Yes, enter date: _____
Judge or agency whose order is being appealed:

EMERGENCY MOTIONS: MOTIONS FOR STAYS & INJUNCTIONS PENDING APPEAL

Has request for relief been made below? ☐ Yes ☒ No
(See F.R.A.P. Rule 8)
Would expedited appeal eliminate need for this motion? ☐ Yes ☐ No

If No, explain why not: The Source Code of Fonar Corporation will be disclosed to Petitioners themselves and Fonar's exclusive interests in that Source Code will be jeopardized unless this Court's order of June 9, which enabled such disclosure, is modified.

Will the parties agree to maintain the status quo until the motion is heard? ☐ Yes ☐ No

Brief statement of the relief requested: Leave to move to modify and modification of the Court's June 9 Order so that Plaintiff's Source Code, Schematic Drawings and Maintenance Software Manual will not be seen by Petitioners themselves, but only by experts authorized in accordance with the June Order.

By: (Signature of attorney)
Appearing for: (Name of party)
FONAR CORPORATION

s/ LAURENCE SHIFF
LAURENCE SHIFF (LS-2082)

June 16, 1993
Date

Appellant of Petitioner:
☐ Plaintiff ☐ Defendant
Appellee or Respondent:
☒ Plaintiff ☐ Defendant

ORDER

July 14, 1993

Kindly leave this space blank

IT IS HEREBY ORDERED that the motion

and it hereby is ~~granted~~ denied

s/JAMES L. OAKES

s/J.M. WALKER

s/HARLINGTON WOOD
Circuit Judge

7/14/93
Date

UNITED STATES COURT OF APPEALS
-- SECOND CIRCUIT --
FILED JULY 14, 1993
ELAINE B. GOLDSMITH, CLERK

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

----------x

FONAR CORPORATION, :

ORDER

Plaintiff, : 91 Civ. 3805 (LDW)

-against- :

DECCAID SERVICES, INC., EQUI MED LEASING, INC., MEDICAL FUNDING OF AMERICA, INC., DAVID SMITH, MORTON MACKOF, STEPHEN STECKLER, LOUIS TREGLIA and PETER KIM, :

Defendants.

----------x

FILED IN CLERK'S OFFICE/U.S. DISTRICT COURT/
E.D.N.Y./HAUPPAUGE OFFICE FEB 25 1992/
ENTERED 3/2/92 JB

ORDERED, that pending the final disposition of this action or further Order of this Court:

(1) all FONAR Schematics and FONAR Maintenance Software now filed with the Clerk of the Court shall be placed under seal by the Clerk and not made a part of the public record herein;

(2) in the event that any schematic, copy of a schematic or portion thereof, for the FONAR Beta 3000 and Beta 3000M MRI Scanner, is to be filed with the Court Clerk, that it be filed under seal;

(3) in the event that any Maintenance Software or portion thereof, for the Beta 3000 and Beta 3000M, is to be filed with the Court Clerk, that it be filed under seal;

(4) that for purpose of this Order, Maintenance Software is defined as all software for the FONAR MRI Scanner other than Operational Software;

(5) that for purpose of this Order, "Operational Software" is defined through a listing of menus for said software in the User's Manual for the Beta 3000 and Beta 3000M MRI Scanner; and

(6) defendants and their attorneys shall not in any manner, directly or indirectly, transfer the FONAR Schematics or FONAR Maintenance Software or copies thereof, or communicate, orally or in writing, any of the data contained in the FONAR Schematics or FONAR Maintenance Software, to any person other than for purposes directly related to the litigation of this case and any such person to whom such communication is made shall be specifically identified and shall be bound by the terms of this Order.

Dated: Hauppauge, New York
~~December 17, 1991~~
February 25, 1992

s/Leonard D. Wexler
The Honorable Leonard D. Wexler,
United States District Judge

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

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FONAR CORPORATION, Plaintiff, -against- DECCAID SERVICES, INC., EQUI MED LEASING, INC., MEDICAL FUNDING OF AMERICA, INC., DAVID SMITH, MORTON MACKOF, STEPHEN STECKLER, LOUIS TREGLIA and PETER KIM, Defendants.	AMENDED FINDINGS OF FACT AND CONCLU-SIONS OF LAW CV 91-3805 (Wexler, J.)

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WEXLER, District Judge

CONTEMPT

FINDINGS OF FACT

Pursuant to Rule 60(a) of the Federal Rules of Civil Procedure, this Court amends its Findings of Fact and Conclusions of Law issued on February 28, 1992 as follows:

1. This Court issued a Temporary Restraining Order on October 2, 1991, which clearly and unambiguously prohibited "defendants, its officers, directors, employees, shareholders, agents, and all persons in active concert and participation with them...from copying, reproducing, selling or using

plaintiff's copyrighted 'Maintenance Software' and 'Schematics' (copies of such schematics were filed under seal) for the Beta 3000 and Beta 3000M."

2. Plaintiff's "Maintenance Software" is all the software developed by Fonar which is placed on the disk of the Beta 3000 and Beta 3000M MRI Scanner other than the "Operational Software" on said disk.

3. The "Operational Software" is defined through a listing of menus for said software in the User's Manual for the Beta 3000 and Beta 3000M MRI Scanner.

4. Based on clear and convincing evidence defendants, Deccaid Services, Inc., Peter Kim, Louis Treglia, Stephen Steckler, and Equi Med Leasing, Inc., have knowingly and willfully used Fonar's "Maintenance Software" after the October 2, 1991 Order, despite the Court's order that they are prohibited from doing so.

5. The plaintiff has suffered the following damages as a result of the contemptuous conduct of defendants, Deccaid Services, Inc., Peter Kim, Louis Treglia, Stephen Steckler, and Equi Med Leasing, Inc.:

(a) attorneys' fees attributable to moving for and proving contempt claimed to be $79,889.00.

CONCLUSIONS OF LAW

1. This Court has jurisdiction over all parties and over the subject matter of the complaint and has venue with respect thereto pursuant to U.S.C. Title 17, § 101 et seq., 28 U.S.C. § 1338 and 28 U.S.C. § 1400(a).

2. "[C]ourts have inherent power to enforce compliance with their lawful orders through civil contempt." Shillitani v. United States, 384 U.S. 364, 370 (1966); Henry G. Spallone v. United States, et al., 493 U.S. 263 (1990). In addition, the Court has statutory power pursuant to 18 U.S.C. § 401 which states: "A court of the United States shall have power to punish by fine or imprisonment, at its discretion, such contempt of its authority."

The criteria for the adjudication of contempt are met when (1) the order the party allegedly failed to comply with is clear and unambiguous; (2) the proof of noncompliance is clear and convincing; and (3) the party has not diligently attempted in a reasonable manner to comply. See EEOC v. Local 638, Local 28 of Sheet Metal Workers' Int'l. Ass'n., 753 F.2d 1172, 1178 (2d Cir. 1985), aff'd, 478 U.S. 421 (1986); Powell v. Ward, 643 F.2d 924, 931 (2d Cir.) (per curiam), cert. denied, 454 U.S. 832 (1981). N.Y. State Nat. Organization for Women v. Terry, 886 F.2d 1339, 1351 (2d Cir. 1989).

This Court's order of October 2, 1991, was "clear and unambiguous" and the proof of non-compliance is "clear and convincing." The defendants, Deccaid Services, Inc., Peter Kim, Louis Treglia, Stephen Steckler and Equi Med Leasing, Inc., willfully and deliberately violated this Court's order of October 2, 1991 and are therefore adjudicated to be in contempt.

3. When the violation is willful, a court may award compensatory damages or fines to make an aggrieved party whole. Vuitton et Fils, S.A. v. Carousel Handbags, 529 F.2d 126 (2d Cir. 1979), Rule 43(c),

Civil Rules of the United States District Courts for the Southern and Eastern Districts of New York ("Civil Rules"). Compensatory damages may include attorneys fees, Fleischman Distilling Corp. v. Maier Brewing Co., 386 U.S. 714, 718 (1967); Rule 43(a), Civil Rules. Because of the adjudication of contempt, this Order directs the following procedures designed to avoid any future action in contempt of this Court's authority. See Superior Testers, Inc. v. Damco Testers, Inc., 336 F.Supp. 37, 40 (E.D. Louisiana 1971).

(1) The November 1, 1991 Order which states "That defendants, Deccaid Service, Inc., Stephen Steckler, Louis Treglia, Peter Kim, and Equi Med Leasing, Inc., are prohibited from servicing any Fonar MRI Scanners" is hereby modified so that defendants may make any repairs to Fonar MRI Scanners that do not require the use of Fonar Maintenance Software or Fonar Schematics pending the ultimate disposition of this action and applying this Order to all adjudicated contemnors and its officers, directors, employees, shareholders, agents, and all persons in active concert and participation with them;

(2) That all adjudicated contemnors including their officers, directors, employees, shareholders, agents, and all persons in active concert and participation with them, are prohibited from forming other business entities or acting with other individuals or business entities in servicing any Fonar MRI Scanners, so as to prevent the circumvention

or evading of this Court's Order prohibiting servicing of Fonar MRI Scanners through the use of Fonar Maintenance Software or Fonar Schematics.

(3) That no other defendant, its officers, directors, employees, shareholders, agents, and all persons in active concert and participation with them can service their Fonar MRI Scanners through the use of Fonar Maintenance Software or Fonar Schematics pending the ultimate disposition of the action; and

(4) Fonar shall produce copies of the copyrighted maintenance software for the Court and for each of the named defendants.

(5) Defendants shall file any papers opposing plaintiff's computation of their attorneys' fees within 30 days of the date of this Order.

PRELIMINARY INJUNCTION

FINDINGS OF FACT

1. Fonar Corporation developed software for the operation and maintenance of its Beta 3000 and Beta 3000M MRI Scanner.

2. "Maintenance Software" for the Beta 3000 and Beta 300M is defined as all software other than "Operational Software" for the Beta 3000 and Beta

3000M MRI Scanner.

3. "Operational Software" is described in listed menus in the "User's Manual" of the Beta 3000 and Beta 3000M MRI Scanner.

4. Plaintiff's "Maintenance Software" is an unpublished work over which Fonar has maintained proprietary control.

5. Despite the fact that Fonar "Maintenance Software" is an unpublished work, it has since at least 1986 placed a copyright notice on its "Maintenance Software."

6. On July 19, 1991, Fonar duly registered its copyright of the "Maintenance Software" for the Beta 3000 and Beta 3000M in the United States Copyright Office under Registration Number TXU-475-784 as an unpublished work, under applicable provision for computer programs containing trade secrets.

7. Fonar, in the development of its Beta 3000 and Beta 3000M MRI Scanners, developed "Schematics" for Fonar circuit boards.

8. Plaintiff has maintained its "Schematics" for the Beta 3000 and Beta 3000M MRI Scanners as proprietary and as "trade secrets" and has accomplished these ends regarding "Schematics" through:

(1) exclusive access and use of said "Schematics" by Fonar employees only;
(2) Confidentiality Agreements with employees; and
(3) Proprietary Notices on said "Schematics".

9. Deccaid Services, Inc., Peter Kim, Louis Treglia, Stephen Steckler, and Equi Med Leasing, Inc.'s possess and used Fonar "Maintenance Software" and

"Schematics" in repairing Fonar Beta 3000 and Beta 3000M MRI Scanners without permission of Fonar.

10. Defendant David Smith contends he possesses a right to use Fonar "Maintenance Software" despite the lack of any grant of such a right by Fonar to do so.

11. Medical Funding's vice president, David Smith, is cognizant of, and, in fact, oversees repairs made by Deccaid Services, Inc. of the Fonar MRI Scanners owned by Medical Funding. He has since 1989, been active in finding and soliciting others to service Fonar MRI Scanners.

12. Medical Funding has allowed Deccaid Services, Inc., to repair Medical Funding's Fonar MRI Scanners with knowledge that Deccaid repairs such MRI Scanners with Fonar "Maintenance Software" and "Schematics" despite no granting of such a right by Fonar.

13. Certain types of repairs can be made to Fonar MRI machines without the use of Fonar "Maintenance Software" or "Schematics", e.g., repairs to power supply units, water chillers, and other non-computer board mechanical problems.

14. Plaintiff will suffer irreparable harm through:

(a) the infringement of its exclusive use of the copyrighted "Maintenance Software";
(b) by damage to its business reputation and good will;
(c) that the continued use and copying of plaintiff's "Maintenance Software" and "Schematics" by the defendants, their affiliates, or agents, will increase the likelihood of other customers or third-party service companies

misappropriating plaintiff's property in a similar fashion; and

(d) because of the difficult of presentation of sufficient proof and precise measurement of damages that will be required at the eventual trial of this action.

CONCLUSIONS OF LAW

1. This Court has jurisdiction over all parties and over the subject matter of the complaint and has venue with respect thereto, pursuant to U.S.C. Title 17, § 101 et seq., 28 U.S.C. Section 1338 and 28 U.S.C. § 1400(a).

2. "The settled law of this circuit is that a preliminary injunction may be granted only upon a showing of '(a) irreparable harm and (b) either (1) likelihood of success on the merits of (2) sufficiently serious questions going to the merits to make them a fair ground for litigation and a balance of hardships tipping decidedly toward the party requesting the preliminary relief.'" Hasbro Bradley, Inc. v. Sparkle Toys, Inc., 780 F.2d 189, 192 (2d Cir. 1985) (quoting Jackson Dairy, Inc. v. H.P. Hood & Sons, 596 F.2d 70, 72 (2d Cir. 1979)) (and citing Mattel, Inc. v. Azrak-Hamway International, Inc., 724 F.2d 357, 359 (2d Cir. 1983)). The plaintiff has met its burden of showing irreparable harm and a likelihood of success on the merits.

3. "In an infringement action, a plaintiff must establish ownership of the copyright and copying by the

defendant. McGraw-Hill, Inc. v. Worth Publishers, Inc., 335 F.Supp. 415, 519 (S.D.N.Y. 1971); 1 Nimmer Sec. 141 at 611." Reyher v. Children's Television Workshop, 533 F.2d 87, 90 (2d Cir. 1976). The plaintiff has established ownership of the copyright and copying by the defendant.

4. "The certificate of registration is prima facie proof of ownership and validity. Novelty Textile Mills, Inc. v. Joan Fabrics Corp., 558 F.2d 1090, 1092 n.1 (2d Cir. 1977)." York Wallcoverings, Inc. v. Coloroll, Inc., 681 F.Supp. 1004, 1007 (E.D.N.Y. 1987). Plaintiff has established its prima facie proof of ownership and validity through its Certificate of Registration.

5. The copying and use by all defendants of plaintiff's "Maintenance Software" and "Schematics" are proven by the use of Deccaid Services, Inc. and its employees Peter Kim, Louis Treglia and Stephen Steckler and in the complicity of the remaining defendants in seeking, promoting, and soliciting the illegal service of Deccaid Services, Inc. in repairing the subject machines owned by defendants, Equi Med Leasing, Inc. and Medical Funding of America, Inc.

6. "Existence of irreparable injury is presumed upon a showing of prima facie case of copyright infringement." Video Trip Corp. v. Lightning Video, Inc., 866 F.2d 50, 51-52 (2d Cir. 1989). A prima facie case of copyright infringement is proven herein and therefore irreparable injury is presumed.

7. "[I]rreparable harm will befall the copyright holder upon the infringement of its exclusive use of the copyrighted matter." Miller Brewing Co. v. Carling

O'Keefe Breweries, 452 F Supp. 429, 437-438 (W.D.N.Y. 1978). Therefore, danger of irreparable harm is demonstrated herein.

8. Irreparable injury is suffered where monetary damages cannot be calculated with a reasonable degree of certainty or will not adequately compensate the injured party. Danielson v. Local 275, Laborers Int. U. of No. Amer., 479 F.2d 1033, 1037 (2d Cir. 1973). Damage to reputation and goodwill, as well as difficulty in proving damages with certainty, prove a danger of irreparable harm.

9. Because of the proof regarding the Preliminary Injunction application and the accompanying adjudication of Contempt, this Court enjoins all defendants to strictly adhere to the prohibitions of its Order of November 1, 1991, as modified in paragraph 14 of the accompanying Findings of Fact and Conclusions of Law regarding Contempt.

SO ORDERED.

s/Leonard D. Wexler
LEONARD D. WEXLER
UNITED STATES
DISTRICT JUDGE

Dated: Hauppauge, New York
March 9, 1992

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

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FONAR CORPORATION,

Plaintiff,

-against-

DECCAID SERVICES, INC., EQUI MED LEASING, INC., MEDICAL FUNDING OF AMERICA, INC., DAVID SMITH, MORTON MACKOF, STEPHEN STECKLER, LOUIS TREGLIA and PETER KIM,

Defendants.

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ORDER

CV 91-3805
(Wexler, J.)

WEXLER, District Judge

On May 11, 1992, this Court signed a Confidentiality Order that had been prepared by Fonar Corporation ("plaintiff"). Subsequently, three defendants have written letters to the Court objecting to certain sections of that Order which, they believe, will interfere with their right to engage expert witnesses of their choice by giving plaintiff a right to object to said witnesses before "confidential material" is turned over to them. Defendants also object to the time schedule relating to any objections plaintiff may have to defendants' choices of expert witnesses, and to the fact that the Order grants plaintiff the right to designate which of its software and documents are entitled to

"confidentiality."

Considering both the factual history of this case and the seemingly endless delays related to discovery, the Court finds that this Confidentiality Order is appropriate in order to move the parties toward timely trial preparation. Moreover, the Order does not give plaintiff any right to select or disqualify defendants' expert witnesses. Plaintiff only has the right to object to defendants' potential expert witnesses before they are shown plaintiff's "confidential" materials.

Furthermore, the Court is not pre-judging the issues of whether plaintiff's software and schematics are trade secrets or protected by valid copyrights. These issues are reserved for trial. The Confidentiality Order merely protects plaintiff's material until these issues are decided.

In addition, the Court does not expect that plaintiff will offer objections to defendants' proposed expert witnesses unless defendants engage experts who have a documented history of improperly using trade secrets or potential trade secrets that have come into their possession.

Finally, should any objections arise regarding these, or any other discovery related issues, the Court, in order to keep to its July trial schedule, intends to resolve such issues promptly. If the need arises, the

time periods set forth in the Confidentiality Order can be compressed.

SO ORDERED.

s/Leonard D. Wexler
LEONARD D. WEXLER
United States District Judge

Dated: Hauppauge, New York
May 4, 1993